(47)

No. 05-184

In The
Supreme Court of the United States

SALIM AHMED HAMDAN,
Petitioner,

v.

DONALD H. RUMSFELD, *et al.*,
Respondents.

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

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INTERESTS OF *AMICI CURIAE*

This amicus curiae brief in support of Petitioner Hamdan is submitted pursuant to Rule 37 of the Rules of this Court, with the written consent of both petitioner and respondent, whose consent letters have been filed with the Clerk of Court.[1]

Amici are law professors, lawyers, and constitutional law scholars who focus professionally on the constitutional questions presented by the President's November 13, 2001 Military Order, Title 3, *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism*, 66 Fed. Reg. 57,833 (Nov. 13, 2001). The issue addressed by this amicus curiae brief – whether the President of the United States may establish military commissions in the absence of a formal declaration of war or explicit Congressional authorization – presents a classic constitutional law issue with which amici are knowledgeable, and about which they are deeply concerned.

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[1] No counsel for a party authored this brief in whole or in part, and no person or entity made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The November 13, 2001 Military Order, Title 3 - *Detention, Treatment, and Trial of Certain Non-Citizens in the War Against Terrorism* ("2001 Order") violates the separation of powers doctrine because it gives the Secretary of Defense the authority to create military commissions to determine offenses and decide the guilt of non-citizens suspected of involvement in terrorist activities. *2001 Order*, 4(c)(2)-(3), (6)-(7), 66 Fed. Reg. 57,833 (Nov. 13, 2001). The Constitution grants the executive no power to establish military commissions so far removed from the exigencies of war. Nor did Congress grant the President the authority to establish these commissions, either explicitly by statute or implicitly through a formal declaration of war. As a result, the President may not displace functioning civilian courts through the creation of military commissions.

This Court has not previously condoned the military commissions at issue. A fair reading of *Ex Parte Quirin*, 317 U.S. 1 (1942) demonstrates that the Court's holding in that case was as precarious as it is peculiar. On a more fundamental level, each military commission must be rooted in specific and unequivocal congressional approval. The fact that Congress authorized the President to exercise limited judicial power during World War II in the context of almost wholly dissimilar circumstances does not imply the authorization of a similar power in this case.

Congress may, through express legislative action, authorize a president to do what the President has done here. In the absence of such express legislative action, both the military commissions, and the President's exercise of the judicial power in trying Petitioner Salim Ahmed Hamdan, violate the Constitution's express terms.

ARGUMENT

With regard to both judicial power and the power to declare war, the United States Constitution is explicit: "The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish," U.S. Const. art. III, § 1; and, "The Congress shall have Power * * * To define and punish * * * Offences against the Law of Nations * * * [and to] declare war * * *" U.S. Const. art. I, § 8, cl. 10-11.

Even in the most pressing of national emergencies, the President may not go beyond these cornerstones that establish the separation of powers in our constitutional democracy. Due to its disregard of this mandated separation of powers, the President's November 13, 2001 Order establishing military commissions violates the Constitution.

I. THE PRESIDENT'S ROLE AS COMMANDER IN CHIEF DOES NOT INCLUDE THE INHERENT POWER TO CREATE MILITARY COMMISSIONS.

This Court has never held that the President has constitutional authority, inherent in his role as Commander in Chief, to establish military commissions. *Ex Parte Quirin*, 317 U.S. at 29 ("[I]t is unnecessary for present purposes to determine to what extent the President as Commander in Chief has constitutional power to create military commissions without the support of Congressional legislation.").

In a limited number of cases, this Court has found that the President has inherent authority to "seize and subject to disciplinary measures" any enemies who have violated the law of war. *In Re Yamashita*, 327 U.S. 1, 12 (1946). The foundation for that holding has always been the urgent need of the occupying force to act as an administrator and arbiter of justice over territory where recourse to the courts is not available or practical given the territory's political instability. Outside of the theatre of war – where, as here, the courts are fully functioning and capable of adjudicating guilt and determining appropriate punishment – military commissions have no place unless specifically authorized by Congress.

The Circuit Court did not examine this critical distinction between 1) the President's power, created either by a formal declaration of war by Congress, or exigent circumstances within the "war zone," and 2) the President's more limited authority when no formal declaration or exigent circumstances exist. For this reason, the Circuit Court did not recognize that the "war zone" argument centered on the *source* of the authority for the commission in the first place, not the *venue* where the defendants were tried. *See Hamdan v. Rumsfeld*, 415 F.3d 33, 38 (D.C. Cir. 2005). The Court in *Yamashita* recognized that Congress' formal declaration of war and the exigent circumstances created by Japan's surrender were essential underpinnings to the legal authority of the military commission at issue, writing that there is "authority so long as a state of war exists – from its declaration until peace is proclaimed." *Yamashita*, 327 U.S. at 11-12.

In the context of a ravaged post-war Europe still under U.S. control, the Court further illuminated the purpose behind a wartime occupier's authority to create military commissions, when it wrote that "[t]he President has the urgent and infinite responsibility not only of combating the enemy but of governing any territory occupied by the United States by force of arms." *Madsen v. Kinsella*, 343 U.S. 341, 348 (1952) (affirming the jurisdiction of a U.S. military commission in Germany after World War II, during the period when the U.S. was occupying that territory).[2] Thus, wartime circumstances can create a need for the expansion of executive authority, but as this Court explained in *Duncan v. Kahanamoku*, 327 U.S. 304 (1946) martial law has no place beyond the situations described above:

> Indeed prior to the Organic Act, the only time this Court had ever discussed the supplanting of courts by military tribunals in a situation other than that involving the establishment of a

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[2] The responsibility described by the Court in *Madsen* arose not only during the Allied occupation of Axis nations after World War II, but also in the period after the Union defeated the Confederacy at the end of the Civil War. *The Grapeshot*, 76 U.S. 129 (1869). In *The Grapeshot*, the Court held that after the Confederacy's defeat, "it became the duty of the National government, wherever the insurgent power was overthrown, and the territory which had been dominated by it was occupied by the National forces, to provide as far as possible, so long as the war continued, for the security of persons and property, and for the administration of justice." *Id.* at 131-32.

> military government over recently occupied enemy territory, it had emphatically declared that civil liberty and this kind of martial law cannot endure together; the antagonism is irreconcilable; and, in the conflict, one or the other must perish.

327 U.S. at 324.

In the war on terrorism, the United States did not become, nor was it the nation's goal to become, the occupier of surrendered territory in the fight against terrorism. Moreover, the civilian courts of the United States are fully functioning, and have shown themselves capable of resolving cases arising from the War on Terror. As this Court determined when holding that trial before a military commission was unconstitutional in *Ex Parte Milligan*, 71 U.S. 2 (1866), "[m]artial rule can never exist where the courts are open, and in the proper and unobstructed exercise of their jurisdiction" because the "Constitution of the United States is the law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." 71 U.S. at 120-21, 127. The purpose behind the military commissions that arose in the cases cited by the Circuit Court are not found here, and thus do not provide a basis for the establishment of those commissions.

II. CONGRESS DID NOT GRANT THE PRESIDENT EXPRESS AUTHORITY TO ESTABLISH MILITARY COMMISSIONS.

The power to establish military commissions is implicit in a formal declaration of war. *In Re Yamashita*, 327 U.S. at 11. Absent a formal declaration, there must be explicit congressional approval to establish military commissions. Without Congressional approval, the President lacks power to make law or to determine guilt and punishment.

In this case, Congress' Authorization for the Use of Military Force ("AUMF") differs from a declaration of war and does not expand the President's power to establish military commissions. Nor do Sections 821 or 836 of the Uniform Code of Military Justice ("UCMJ") legitimize the 2001 Order.

A. The AUMF Does Not Provide the President Authority to Create the Military Tribunals.

In the AUMF, Congress authorized the President "to use all necessary and appropriate force against those nations, organizations, or persons he determines planned, authorized, committed, or aided" the attacks. Authorization for Use of Military Force, Pub. L. No. 10740, 115 Stat. 224, 224 (2001). The AUMF does not grant authority to establish military tribunals for the following reasons.

First, the AUMF does not qualify as a formal declaration of war. The House of Representatives, when discussing the constitutional context of the

War Powers Resolution upon which the AUMF relies, stated that "[t]he term "war powers" may be taken to mean the authority inherent in national sovereignties to declare, conduct, and conclude armed hostilities with other states." H.R. Rep. No. 93-287 92d Cong., 2d Sess. 2346 (1972). Because no other sovereign nation was mentioned in the AUMF, it cannot constitute a declaration of war.

Second, if Congress' AUMF carries the weight of a declaration of war, it would be unconstitutional because it grants the President the ability to create and conduct military tribunals in violation of Article I Section 8 of the Constitution without setting meaningful limits on this expanded authority. U.S. Const. art. I § 8, cl. 9 (granting Congress the sole right to create tribunals inferior to the Supreme Court). The AUMF authorizes force "against those nations, organizations, or persons he determines planned, authorized, committed, or aided the terrorist attacks that occurred on September 11, 2001, or harbored such organizations or persons." Such an authorization could be deemed to extend indefinitely, subject to the President's sole determination. By granting the President virtually unlimited power to decide when, and if, his power to engage in war and to hold military commissions ends, the AUMF would unconstitutionally cede power to the President in violation of Article I, Section 8.

B. Neither Section 821 nor Section 836 of the UCMJ Authorizes the President's Creation of the Military Commissions.

Similarly, neither 10 U.S.C. §§ 821 nor 836 of the UCMJ permits the President to prosecute detainees before specially created military commissions. Section 821 preserves the existing common law of war courts, which does not cover the detainees.[3] Section 836 grants the President the power to establish the rules for military commissions, but does not grant him the power to create them.

Section 821 did not grant the President express authority to convene and try persons before a military commission; it established concurrent jurisdiction for persons subject to the UCMJ. H.R. Rep. 81-491, 81st Cong., 1st Sess. 1, 17 ("This article preserves existing Army and Air Force law which gives concurrent jurisdiction to military tribunals other than courts martial."); *see also* H.R. Rep. 81-

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[3] 10 U.S.C. § 821 provides that:

> The provisions of this chapter conferring jurisdiction upon courts-martial do not deprive military commissions, provost courts, or other military tribunals of concurrent jurisdiction with respect to offenders or offenses that by statute or by the law of war may be tried by military commissions, provost courts, or other military tribunals.

491, 13. Section 821[4] was first proposed in 1916 as part of a general expansion of the Articles of War; its purpose can be found in the testimony of Judge Advocate General of the Army Crowder before the Senate Subcommittee:

> It just saves to these war courts the jurisdiction they now have and makes it a concurrent jurisdiction with courts-martial, so that *the military commander in the field in time of war* will be at liberty to employ either form of court that happens to be convenient. Both classes of courts have the same procedure.[5]

Madsen v. Kinsella, 343 U.S. 341, 353 (1952) (quoting S. Rep. No. 64-130, 40) (emphasis added). Thus, Section 821 did not authorize creation of military commissions; it simply allowed a choice between courts-martial and lawfully established military commissions.

Section 821 preserved the existing common law jurisdiction of military commissions and defined its scope. The word "concurrent" in Section 821 makes clear that any grant of Congressional

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[4] Section 821 was originally known as Article 15 of the Articles of War. In 1950, it was recodified as Section 821 of the UCMJ.

[5] Although Judge Advocate General of the Army Crowder anticipated that both types of courts would follow the same procedure, the military commissions established by the 2001 Order differ significantly from courts-martial.

authority was *no greater than* the newly expanded jurisdiction of the Articles of War. *Kinsella*, 343 U.S. at 353 (quoting S. Rep. No. 63-229, 98-99) ("I wish to make it perfectly plain by the new article that in such cases the jurisdiction of the war court is concurrent."). When two courts have "concurrent" jurisdiction, the jurisdictional restrictions on one court also limit the jurisdiction of the second. *United States v. Sherwood*, 312 U.S. 584, 591 (1941). In *Sherwood*, this Court held that the Tucker Act's grant of "original jurisdiction, concurrent with the United States Court of Federal Claims" to the district courts was limited to cases that could originally be brought in the Court of Federal Claims. *Id.* Thus, if Section 821 is to be seen as an express grant of authority from the Congress to the President to convene military commissions, that grant must be limited to military commissions with concurrent jurisdiction with the UCMJ.

Nor does Section 836 authorize the President to try military detainees before special military commissions: it provides only that, once a military commission is duly convened under the UCMJ, the President has the authority to prescribe its rules and procedures, subject to the limitations set out by that Section. By its own terms, Section 836 is limited to "cases arising under this chapter triable in courts-martial, military commissions and other military tribunals, and procedures for courts of inquiry." 10 U.S.C. § 836. There is nothing in the text of Section 836 authorizing the President to establish a military commission.

C. *Ex Parte Quirin* Does Not Support the Circuit Court's Ruling.

Though the Circuit Court relied on *Ex Parte Quirin* in support of its ruling, key differences exist between it and the instant case. In *Quirin*, the Court relied significantly on Congress' declaration of war against Germany, and on the President's expanded power during war time. *Id.* at 25, 26, 35, 42.[6] Beginning with Congress' declaration of war, the Court in *Quirin* found Congressional authorization for military commissions in a series of statutes working together.

Here, no formal declaration of war has been declared. Indeed, Congress specifically declined to grant the President the broad powers implied by a declaration of war, after hearing debate on that very issue. During the House debate on the AUMF, Representative Conyers stated:

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[6] *Quirin*, 317 U.S. at 26 (stating that "the Constitution thus invests the President, as Commander in Chief, with the power to *wage war which Congress has declared*"); *id.* at 25 ("But the detention and trial of petitioners - ordered by the President in the declared exercise of his powers as Commander in Chief of the Army *in time of war* and of grave public danger - are not to be set aside by the courts without the clear conviction that they are in conflict with the Constitution or laws of Congress constitutionally enacted."); *id.* at 35 (stating that "those who *during time of war* pass surreptitiously from enemy territory into our own * * * have the status of unlawful combatants punishable as such by military commission"); *id.* at 42 ("It has never been suggested in the very extensive literature of the subject that an alien spy, *in time of war*, could not be tried by military tribunal without a jury.") (emphases added).

> In terms of the specifics of the resolution, as ranking member of the Judiciary Committee, I believe it is important that the record reflect what the resolution does and does not do. By not declaring war, the resolution preserves our precious civil liberties. This is important because declarations of war trigger broad statutes that not only criminalize interference with troops and recruitment but also authorize the president to apprehend "alien enemies."

147 Cong. Rec. H5638, 5680 (2001).

Representative Barr also stated that the AUMF falls short of a declaration of war:

> Mr. Speaker, I support this resolution. I support this legislation. However, we ought to be here this evening debating a declaration of war. * * * There is one way, and one way only, Mr. Speaker, to respond to acts of war, and that is to declare war. Give the president the tools, the absolute flexibility he needs under international law and the Hague Convention to ferret these people out wherever they are, however he finds them, and get it done as quickly as possible. We need a declaration of war. *I urge my colleagues to keep that in mind and to support a declaration of*

> *war above and beyond this power that we will give the President this evening.*

147 Cong. Rec. at H5653 (emphasis added).

In addition, the *Quirin* Court relied on two statutes – Articles of War 81 and 82 – that are not implicated by the 2001 Order at issue in this case. These differences make it impossible to rely upon *Quirin* as precedent for the Circuit Court's opinion.

CONCLUSION

The President's creation of military tribunals was not implicitly authorized by a formal declaration of war, nor was it explicitly authorized by an act of Congress. As a result, the 2001 Order is an unconstitutional encroachment upon both the legislative and judicial branches. For this reason, the *amici* respectfully submit that the 2001 Order violates the fundamental Constitutional principle of separation of powers. The Circuit Court's ruling should be reversed.

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